No. 011099 JAN 22 2002

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MICHAEL ERIKSON,

Petitioner,

v.

PAWNEE COUNTY, an Oklahoma political subdivision, ex rel. BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, LARRY STUART, in his official capacity as District Attorney for Osage and Pawnee Counties, HARLAND STONECIPHER, individually and as President of the Oklahoma Sportman's Association, OKLAHOMA SPORTMAN'S ASSOCIATION, MICHAEL TURPEN, individually and as an employee and shareholder of the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC., an Oklahoma professional corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARK BARRETT OK #557
Counsel of Record
P.O. Box 896
Norman, OK 73070
(405) 364-8367

CHERYL A. PILATE MO #42266
WYRSCH HOBBS & MIRAKIAN, P.C.
1101 Walnut, Suite 1300
Kansas City, MO 64106
(816) 221-0080 Telephone
(816) 221-3280 Facsimile

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court may dismiss a civil rights complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that it lacks specificity when this Court's decision in *Crawford-El v. Britton*, 523 U.S. 574 (1998), suggests a district court faced with such a situation should either require a reply or a more definite statement, and, further whether such action by the district court violates the Due Process Clause of the Fifth Amendment, which guarantees notice and an opportunity to be heard? Divergent circuit views on whether *Crawford-El* permits or precludes a heightened pleading standard in civil rights cases involving individual defendants make this issue ripe for this Court's consideration.

2. Whether a district court may dismiss a civil rights complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground it lacks specificity without granting Plaintiff an opportunity to amend.

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents..... ii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction..... 1

Constitutional Provisions, Statutes and Rules..... 2

Statement of the Case 3

Reasons for Granting the Writ..... 11

I. The Appellate Court's And District Court's Dismissal of Mr. Erikson's Civil Rights Complaint on the Ground it Was Not Sufficiently Specific Conflicts with Rule of *Crawford-El v. Britton;* this Court's Review Is Warranted Because The Circuit Courts Have Adopted Divergent Approaches as to Whether a Heightened Pleading Standard Is Required in Civil Rights Cases Involving Individual Defendants..... 11

II. The Dismissal Without Providing an Opportunity to Amend Was in Conflict with Controlling Authority of this Court and with Fundamental Policies Behind the Federal Rules of Civil Procedure..... 20

Conclusion 21

APPENDIX

Page

Opinion of the Tenth Circuit in *Erikson v. Pawnee County Board of County Commissioners, et al.*, Case No. 00-5190 (10th Cir. August 23, 2001) 1a

Judgment of the Tenth Circuit in *Erikson v. Pawnee County Board of County Commissioners, et al.*, Case No. 00-5190 (10th Cir. August 23, 2001) 9a

Order of the United States District Court for the Northern District of Oklahoma in *Erikson v. Pawnee County Board of County Commissioners, et al.*, Case No. 99-CV-786-BU(M) (N.D. Okla. August 18, 2000) 11a

Report and Recommendation of the United States Magistrate Judge in *Erikson v. Pawnee County Board of County Commissioners, et al.*, Case No. 99-CV-786-BU(M) (N.D. Okla. June 20, 2000) 14a

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993).....

Complaint in *Erikson v. Pawnee County Board of County Commissioners, et al.*, Case No. 99-CV-0786-BU(M) (filed September 16, 1999) 23a

Aid to the Court, *Erikson v. Pawnee County et al.*, Case No. 99-CV-0786-BU(M) (filed April 10, 2000)..... 39

Plaintiff's Objection to this Report and Recommendation of The Magistrate, *Erikson v. Pawnee County, et al.*, Case No. 99-CV-0786-BU(M) (filed July 5, 2000) 47a

TABLE OF AUTHORITIES

Page

CASES

Brummett v. Camble, 946 F.2d 1178 (5th Cir. 1991) 8

Bryson v. City of Edmond, 905 F.2d 1386 (10th Cir. 1990) 14

Conley v. Gibson, 355 U.S. 41 (1957) 12, 21

Crawford-El v. Britton, 523 U.S. 574 (1998) ..... *passim*

Currier v. Doran, 242 F.3d 905 (10th Cir. 2001), cert. denied, 122 S.Ct. 543 (U.S. 2001) 14, 15, 17

Erikson v. Pawnee County Board of County Commissioners, 263 F.3d 1151 (10th Cir. 2001) ..... *passim*

Foman v. Davis, 371 U.S. 178 (1962) 21

Grannis v. Ordean, 234 U.S. 385 (1914) 17

Hall v. Bellmon, 935 F.2d 1106 (10th Cir. 1991) 14

Harbury v. Deutch, 233 F.3d 596 (D.C. Cir. 2000), cert. denied, *Christopher v. Harbury*, 122 S.Ct. 663 (U.S. 2001) 15, 16

Hubbert v. City of Moore, 923 F.2d 769 (10th Cir. 1991) 7

Judge v. Lowell, 160 F.3d 67 (1st Cir. 1998) 14

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) 12

Nance v. Vieregge, 147 F.3d 589 (7th Cir. 1998), cert. denied, 525 U.S. 973 (1998) 15, 16

Ortega v. Christian, 85 F.3d 1521 (11th Cir. 1996) 16

Parker v. City of Midwest City, 850 P.2d 1065 (Okla. 1993) 8

TABLE OF AUTHORITIES – Continued

Page

Robinson v. Maruffi, 895 F.2d 649 (10th Cir. 1990) 7

Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999) 15

CONSTITUTION

United States Constitution, Amendment IV.....2, 5

United States Constitution, Amendment V.....2, 21

STATUTES

28 U.S.C. § 1254..... 1

28 U.S.C. § 1291..... 1

28 U.S.C. § 1331.....1, 4

28 U.S.C. § 1332.....1, 4

42 U.S.C. § 1983.....1, 3, 4, 8

RULES

Fed. R. Civ. P. 12(b)(6).....3, 5

Fed. R. Civ. P. 12(e) 20

OPINIONS BELOW

The decision of the United States Court of Appeals of which Petitioner seeks review is reported as *Erikson v. Pawnee County Board of County Commissioners*, 263 F.3d 1151 (10th Cir. 2001). The opinion also appears in the Appendix to this Petition at App. 1a. The decision of the district court is not reported and appears at App. 11a. *Erikson v. Pawnee County, et al.*, Case No. 99-CV-786-BU(M) (N.D. Okla. Aug. 21, 2000). The district court adopted the Report and Recommendation of the Magistrate Judge, issued two months earlier. *Erikson v. Pawnee County, et al.*, Case No. 99-CV-786-BU(M) (N.D. Okla. June 20, 2000). App. 14a.

STATEMENT OF JURISDICTION

Plaintiff Michael Erikson filed the present lawsuit under 42 U.S.C. § 1983, a federal civil rights statute. Jurisdiction was conferred by section 1983 and by 28 U.S.C. §§ 1331 and 1332. Mr. Erikson appealed the dismissal of his suit to the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1291. The Tenth Circuit affirmed the dismissal by an Opinion issued August 23, 2001. *Erikson v. Pawnee County Board of County Commissioners*, 263 F.3d 1151 (10th Cir. 2001). Mr. Erikson did not file a Petition for Rehearing. Mr. Erikson then sought review by Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254 and Supreme Court Rules 12 and 13.

He timely files the Petition pursuant to an extension of time granted by this Court on November 13, 2001.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The **Fourth Amendment** of the United States Constitution states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

The **Fifth Amendment** of the United States Constitution states as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law;** nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. V (emphasis added).

Section 1983 of Title 42 states as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rule of Civil Procedure 12(b)(6) states as follows:

> **(b). How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may be at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

Mr. Erikson seeks review of a decision of the United States Court of Appeals for the Tenth Circuit in which the court affirmed the dismissal of his civil rights case, brought under 42 U.S.C. § 1983. *Erikson v. Pawnee County*

Board of County Commissioners, 263 F.3d 1151 (10th Cir. 2001). Jurisdiction was conferred by 28 U.S.C. §§ 1331, 1332, and 1291.

Nature of the Case

Michael Erikson was twice prosecuted, unsuccessfully, for his actions in shooting and killing Tony McCollum and Fred Head on his family's ranch property. *Erikson*, 263 F.3d at 1153. Substantial facts pointed to self defense, but the Pawnee County, Oklahoma, prosecutor nonetheless charged Erikson with murder. *Erikson*, 263 F.3d at 1153; App. at 1a. The jury acquitted Erikson of murder and all lesser included offenses in the death of Head. *Erikson*, 263 F.3d at 1153. The jury could not reach a unanimous verdict with regard to McCollum, and the prosecutor then retried Erikson on the charge of voluntary manslaughter. At the second trial, the jury again failed to reach a unanimous verdict on the manslaughter charge, and another mistrial was declared. *Erikson*, 263 F.3d at 1153. Prosecutors later dismissed, without prejudice, the third prosecution, which also charged voluntary manslaughter in the death of McCollum. *Erikson*, 263 F.3d at 1153.

Mr. Erikson then filed suit against the Pawnee County Board of County Commissioners, the District Attorney, and four private defendants under 42 U.S.C. § 1983, alleging that they violated his federal civil rights by conspiring to prosecute him for the deaths of Head and McCollum even though the evidence was not sufficient and did not support probable cause. *Erikson*, 263 F.3d at 1153. Erikson further alleged that the four private

defendants (two individuals, a law firm and the Oklahoma Sportsman's Association) directly participated in and influenced the prosecution. The actions of the private defendants, according to the allegations, included contributing funds to a law firm, which then in turn provided "research assistants and investigators" to the prosecution, to assist in the Erikson case. App. at 29a-30a.

The Tenth Circuit Decision

On August 23, 2001, the United States Court of Appeals for the Tenth Circuit issued a decision, without oral argument, affirming the dismissal by the district court of Michael Erikson's federal civil rights complaint under Federal Rule of Civil Procedure 12(b)(6). *Erikson*, 263 F.3d at 1153. The Tenth Circuit stated that it agreed with the findings of the magistrate judge concerning Eleventh Amendment and immunity issues, but did not specifically address those issues. 263 F.3d at 1153-54. The Tenth Circuit instead articulated two additional grounds supporting its decision affirming the dismissal: (1) Erikson did not plead sufficient facts alleging that one of the private defendants, Michael Turpen, "exercised control" over the prosecution; and (2) Erikson did not plead sufficient facts to support a Fourth Amendment claim for malicious prosecution. *Erikson*, 263 F.3d at 1154.

Regarding the first ground, the Tenth Circuit acknowledged that Erikson alleged that Turpen, acting on behalf of the Oklahoma Sportsman's Association (OSA), provided research assistants and investigators to assist the prosecutor, Larry Stuart. The appellate court held that this allegation was not sufficient because it did not state

that Turpen "exercised control over any critical prosecutorial decisions." 263 F.3d at 1154. In fact, the Complaint states that the OSA, led by Harland Stonecipher (the other individual defendant) began to "actively conspire" to cause Erikson to be unlawfully tried for crimes he did not commit. *See* App. at 29a. Erikson alleged that Turpen, who represented the victims in the case against Erikson, contacted Pawnee County to state he was interested in being appointed special prosecutor. App. at 29a. According to the Complaint, the OSA then raised in excess of $25,000 which it contributed to Turpen, "in an effort to fund the unlawful prosecution of Erikson." App. at 30a. The Complaint further alleged that the OSA remained "actively" involved throughout the prosecution, that its membership "made death threats to Erikson and his family" and caused a "groundless civil suit" to be filed against Erikson. App. at 30a-31a.

Although not artfully pleaded or set forth in detail, the Complaint clearly alleged Turpen's position at the center of conspiratorial activity aimed at bringing a prosecution against Erikson. In his Objections to the Report and Recommendation of the Magistrate, Erikson also gave notice of further allegations he could make if permitted to amend. App. at 47a. (Although the Objections do not constitute a "motion" seeking leave to amend, they may fairly be read as informing the court of allegations that could be raised by Erikson in a properly pleaded Complaint. Erikson's counsel did not file a separate motion to amend the Complaint to add more facts concerning the Turpen issue or the probable cause issue). In the Objections, Erikson stated:

> If not for the efforts of third parties and private individuals, Erikson alleges he never would have been prosecuted for murder. It is remarkable that any private citizen could be subjected to the whims of non-governmental parties and placed on trial for his life on repeated occasions.

App. at 52a.

Although Erikson's attorney did not file a motion specifically seeking leave to amend, he also filed another pleading, entitled "Aid to the Court" which similarly gave notice of facts that Erikson believed he could prove. In that pleading, Erikson stated that the prosecutor solicited private funds to support his prosecution of Erikson and conspired with the Turpen, Stonecipher, the Riggs-Abney law firm and the OSA to prosecute Erikson. App. at 40a-41a.

With regard to the Fourth Amendment claim, the Tenth Circuit held that the "lack of probable cause" was not pleaded with sufficient specificity.[1] The Tenth Circuit stated:

---

[1] The Tenth Circuit rejected the malicious prosecution claim because of the perceived pleading problem, at least in part. The appellate court also stated that it agreed with the magistrate judge's analysis, which included a determination that the "state court finding of probable cause sufficient to hold Plaintiff for trial" precluded litigation of the malicious prosecution claim in federal court. App. at 14a. The magistrate judge relied on *Hubbert v. City of Moore*, 923 F.2d 769 (10th Cir. 1991). *Hubbert* does not, however, mandate automatic dismissal of a section 1983 malicious prosecution claim when there has been a state court finding of probable cause. For instance, if probable cause is procured through fraud, the Tenth Circuit has allowed malicious prosecution claims to proceed despite a prior probable cause finding. *See Robinson v. Maruffi*, 895 F.2d 649

> Under Oklahoma law, a lack of probable cause to bring a criminal prosecution is an essential element of the tort of malicious prosecution. *See Parker v. City of Midwest City*, 850 P.2d 1065, 1067 (Okla. 1993). Here, beyond the conclusory allegation in his complaint that no probable cause existed, plaintiff has not alleged any specific facts showing there was a lack of probable cause for his arrest and prosecution on the charges of first degree murder. Plaintiff's conclusory allegation is insufficient to survive the defendants' motion to dismiss.

Erikson, 263 F.3d at 1154.

Again, in his Objections to the Magistrate's Report and Recommendation, Mr. Erikson gave notice of further allegations that could be added to his Complaint. The pleading stated:

> Additionally, Erikson has indicated that evidence at the scene of the incident may have been tampered with by law enforcement officials and then utilized for purposes of establishing probable cause against him. If Erikson has not made that allegation as clear as he should for consideration by the Court, *he will gladly amend his Complaint to assert his allegation more clearly.*

App. at 50a-51a.

Mr. Erikson thus gave notice to the district court of additional facts he could allege would establish the lack

---

(10th Cir. 1990). Further, there is disagreement among the circuits on whether a section 1983 claim based on malicious prosecution in any instance should depend on state law. *See Brummett v. Camble*, 946 F.2d 1178, 1180 n.2 (5th Cir. 1991).

of probable cause and point to the defendants' efforts to manufacture probable cause against him. *See* footnote 1.

Summary of Allegations in the Complaint

The allegations in the Complaint generally state as follows:

Michael Erikson was tried for murder, then manslaughter, then was scheduled for a third trial before authorities abandoned their efforts to prosecute him. Michael Erikson was not guilty of anything. He has no criminal record, not even a traffic violation. App. at 34a.

For six years, prosecutors pursued Erikson, even though the facts overwhelmingly supported his account that he acted in self defense. App. at 23a-34a.

On the night of June 26, 1992, Erikson was watching his family's property in rural Pawnee County. The Eriksons had been victims of recent thefts. While he was standing guard, Erikson was confronted by Fred Head, Jr., and Tony McCollum. Instead of leaving, they began beating Erikson with a chain and otherwise assaulted him. Erikson eventually shot and killed Head and McCollum. App. at 27a.

Both Head and McCollum were known in the local community as dangerous individuals, and both were avid raccoon hunters and conducted hunting expeditions over private property. App. at 27a.

Mr. Erikson reported the shooting to law enforcement and waited at the scene for their arrival. He was taken to the Payne County jail where he gave a voluntary written statement and was interrogated for several hours. After

three days in the Payne County jail, authorities advised Erikson that charges likely would not be filed. App. at 28a-29a.

Shortly after the incident, the OSA, led by Stonecipher, began to "actively conspire" to have Erikson prosecuted. Three days after the shootings, the district attorney in neighboring Pawnee County received a phone call from Turpen, a private attorney. Turpen, acting at the behest of the alleged victims' families, offered to help prosecute Erikson. The next day, first degree murder charges were filed in Pawnee County. App. at 29a.

The OSA, a group which promotes raccoon hunting, solicited donations nationally and funneled the money to Turpen, who used it to aid the prosecution effort. The State of Oklahoma pursued Mr. Erikson until September 1998, when the third prosecution was dismissed, without prejudice. App. at 30a-33a.

On September 16, 1999, less than one year after the third prosecution was dismissed, Erikson filed his civil rights Complaint in the United States District Court for the Northern District of Oklahoma. App. at 24a. The Complaint alleged conspiracy, malicious prosecution, abuse of process, intentional infliction of emotional distress, and an unspecified violation of the Fourteenth Amendment. The Complaint named six defendants including the Pawnee County Board of County Commissioners; the Prosecutor, Larry Stuart; Mr. Turpen; Mr. Turpen's law firm, Harland Stonecipher; and the OSA.

The Complaint alleged that contributions from the OSA "persuaded the District Attorney of Pawnee County to maliciously prosecute Erikson. . . . " App. at 34a. The

Complaint also alleged that "Pawnee County's goals were driven by the OSA and other politicians despite the fact the state's evidence did not support the continuation of the process." App. at 35a.

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT'S AND DISTRICT COURT'S DISMISSAL OF MR. ERIKSON'S CIVIL RIGHTS COMPLAINT ON THE GROUND IT WAS NOT SUFFICIENTLY SPECIFIC CONFLICTS WITH RULE OF *CRAWFORD-EL V. BRITTON*; THIS COURT'S REVIEW IS WARRANTED BECAUSE THE CIRCUIT COURTS HAVE ADOPTED DIVERGENT APPROACHES AS TO WHETHER A HEIGHTENED PLEADING STANDARD IS REQUIRED IN CIVIL RIGHTS CASES INVOLVING INDIVIDUAL DEFENDANTS

In *Crawford-El v. Britton*, 523 U.S. 574 (1998), this Court addressed the necessary balancing that must occur between the rights of Plaintiffs with "bona fide constitutional claims" and the rights of public officials, who must be protected from "burdensome discovery" arising from meritless claims. *Crawford-El*, 523 U.S. at 595-98. Balancing those competing concerns, this Court rejected the argument that Plaintiffs in civil rights cases should be required prove the "improper motive" of public officials by "clear and convincing evidence." *Id.* at 594-98.[2] At the

[2] The Court stated: "The broad question presented is whether the courts of appeals may craft special procedural rules for such cases [civil rights cases requiring proof of improper

same time, the Court noted that district courts should manage the discovery process so as to protect public officials from undue burdens. Thus, when a plaintiff files a complaint against an individual defendant[3] alleging a wrongful motive, the district court:

> [M]ust exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district has *two primary options* prior to permitting any discovery at all. First, the court *may order a reply* to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or *grant the defendant's motion for a more definite statement* under Rule 12(e).

---

motive] to protect public servants from the burdens of trial and discovery that may impair the performance of their official duties. The more specific question is whether, at least in cases brought by prisoners, the plaintiff must adduce clear and convincing evidence of improper motive in order to defeat a motion for summary judgment." 523 U.S. at 577.

[3] This Court decided that no heightened pleading requirement exists when a plaintiff attempts to bring a civil rights suit against a municipality. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). However, this Court left open the question in *Leatherman* of whether heightened pleading is required in suits against individual government officials: "These decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit – either absolute or qualified – under section 1983. In short, a municipality can be sued under section 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury." This Court thus held that it had "no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Id.* at 166-67. *But see Conley v. Gibson*, 355 U.S. 41, 47 (1957).

Crawford-El, 523 U.S. at 597-98 (emphasis added). Thus, this Court explained, the district "may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598.

Under the analysis of *Crawford-El*, therefore, the district court is required to be mindful of the allegations and to manage the pleading and discovery stages so as to balance the competing concerns of both parties. If a complaint is insufficient, there are "two primary options" – requiring a reply or a more definite statement. *Id.* The court can thus require the plaintiff to put forth "specific, nonconclusory factual allegations" that support the claim of improper motive. *Id.* Necessarily contained in all of these options or suggestions is the requirement that the plaintiff be permitted to re-plead, reply, or otherwise augment the pleadings so as to comply with all requirements. Nowhere does *Crawford-El* state that dismissal should be the first option, with no opportunity to cure any defects in the pleadings.

The language from *Crawford-El* concerning "specific, nonconclusory factual allegations" has spawned a host of divergent opinions and seemingly given rise to a split in the courts of appeal.

An examination of recent case law reveals that some circuits have interpreted the phrase to require a heightened standard of pleading in civil rights cases involving government officials as individual defendants. For instance, the First Circuit has required specificity in pleading a civil rights complaint alleging discrimination

on the part of police officers and a medical examiner. *See Judge v. Lowell*, 160 F.3d 67, 74-75 (1st Cir. 1998). In *Judge*, the First Circuit stated that the district court could demand that improper motive "be pleaded not just conclusorily" but by "specific, nonconclusory factual allegations giving rise to a reasonable inference of [improper] intent." *Judge*, 160 F.3d at 75.

The Tenth Circuit, in Mr. Erikson's case, apparently subscribed to the point of view that the district court may require a heightened pleading standard regarding motive in civil rights cases involving individuals. In its brief opinion, however, the Tenth Circuit neither mentioned *Crawford-El* nor stated that the standard in civil rights cases was any different from the standard in any other type of civil case. The two authorities cited in support of the Tenth Circuit's determination that a "conclusory allegation is insufficient," 263 F.3d at 1154-55, are, however, civil rights cases. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991); *Bryson v. City of Edmond*, 905 F.2d 1386, 1390 (10th Cir. 1990).

A Tenth Circuit case decided a few months before *Erikson* did expressly address pleading requirements in light of *Crawford-El*, however. *See Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001). In *Currier*, the Tenth Circuit initially interpreted *Crawford-El* as prohibiting the fashioning of rules requiring heightened pleading standards in civil rights cases involving individual defendants. *Currier*, 242 F.3d at 912-17. However, the Tenth Circuit further determined that a heightened pleading standard was acceptable, after all, *if* it was imposed by the District Court, rather than the Court of Appeals:

> Finally, to the extent the Supreme Court considered whether a court may require a plaintiff to plead " 'specific nonclusory factual allegations' " to survive a prediscovery motion for dismissal, it concluded this option resides in the *discretion of federal trial judges, not federal circuit courts.*

242 F.3d at 917 (emphasis added) Dismissal, then was deemed inappropriate in *Currier* because the trial court "thought Plaintiffs had alleged sufficient facts to be allowed discovery." *Id.*

Thus, the Tenth Circuit may have adopted in *Currier* an approach that eschews a hard-and-fast rule but instead vests discretion in the district court.

Contrasting with these views, the Seventh Circuit and District of Columbia Circuits have interpreted *Crawford-El* as permitting *no* heightened pleading requirement in civil rights cases. *Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir. 1998); *Harbury v. Deutch*, 233 F.3d 596, 611 (D.C. Cir. 2000). In *Nance*, the Seventh Circuit stated flatly: "Civil rights complaints are not held to a higher standard than complaints in other civil litigation." *Nance*, 147 F.3d at 590 (citing *Crawford-El*). The plaintiff in *Nance* alleged that the defendant "acted intentionally"; "nothing more is required," stated the Seventh Circuit.

In a similar vein is the holding in *Harbury*, where the District of Columbia Circuit stated that this Court, in *Crawford-El*, "held that plaintiffs making constitutional claims based on improper motive need not meet any special heightened pleading standard." *Harbury*, 233 F.3d at 611. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 399 (6th Cir.

1999) (plurality opinion) (*Crawford-El* disallows heightened pleading standard). Further, some courts, even prior to *Crawford-El*, did not require specificity in the pleading of non-municipality civil rights cases. *E.g., Ortega v. Christian*, 85 F.3d 1521 (11th Cir. 1996) ("boilerplate" and "vague" allegations of false arrest and false imprisonment stated a cause of action requiring further proceedings to develop the record).

As the above-cited cases illustrate, there is a sharp lack of agreement among the circuits as to the meaning of *Crawford-El* and whether civil rights cases operate by more stringent pleading requirements with regard to allegations of improper motive. Resolution by this Court is necessary to maintain uniformity among the circuits and resolve a critical question that is certain to arise repeatedly in civil rights litigation.

At a minimum, three divergent views exist regarding whether *Crawford-El* requires civil rights complaints to state allegations of improper motive against individual defendants with greater specificity:

> (1) Following *Crawford-El*, heightened pleading requirements are still appropriate in civil rights cases against individual defendants. This point of view is espoused in the First Circuit's decision in *Judge v. Lowell*;
>
> (2) *Crawford-El* prohibits heightened pleading requirements regarding improper motive against individual defendants. The Seventh Circuit's *Nance* decision and the District of Columbia Circuit's *Harbury* decision are representative of this second line of authority;

> (3) *Crawford-El* does not permit Courts of Appeal to require heightened pleading standards, but leaves to the determination of the district judge whether a heightened standard is appropriate in a case. The determination is that district judges may require heightened standards of pleading in individual defendant cases, but Courts of Appeals may not. This is the position taken in by the Tenth Circuit in *Currier v. Doran*.

The grant of certiorari is necessary not only to resolve the circuit split but also to permit a proper resolution of Mr. Erikson's case. At present, his case stands dismissed, and, as noted in Point II, *infra*, his case was dismissed before there was any opportunity provided to amend the pleadings. This dismissal violated Erikson's Fifth Amendment right to due process of law. *See Grannis v. Ordean*, 234 U.S. 385, 394 (1914). "The fundamental requisite of due process of law is the opportunity to be heard." *Id.* This opportunity was denied Mr. Erikson.

The adequacy of the Complaint concerns two specific allegations: the claim that the private defendants motivated or controlled the prosecution; and the claim that officials lacked probable cause to pursue the prosecution.

With regard to the "private interests" claim, Mr. Erikson clearly stated a number of factual allegations that appeared fairly specific yet did not satisfy the court. Under *Crawford-El*, it would appear that the district court's "primary options" would have been to require a "reply" or a "more definite statement." The district court did neither. Erikson's allegations certainly concerned the issues of influence and improper motive. He in fact stated

that the OSA, as led by Stonecipher, "persuaded the District Attorney . . . to maliciously prosecute Erikson." App. at 34a. He also stated that the prosecutorial goals "were driven by the OSA." App. at 35a. These allegations, along with the other more specific allegations, would appear to adequately state a claim – especially when considered alongside the statements made in Erikson's Objections to the Magistrate's Report and his pleading entitled "Aid to the Court," discussed *supra*. As *Crawford-El* suggests, the district court had "options" that would have allowed Mr. Erikson to strengthen or augment his allegations. The district court did not select these options and instead abruptly terminated Mr. Erikson's litigation.

Mr. Erikson's case squarely presents the issue of what *Crawford-El* requires. Does that decision strictly demand a "heightened pleading standard" and require dismissal of the complaint if the allegations fall short? Or, does *Crawford-El* grant the district court discretion to determine whether heightened pleading is appropriate and what procedural vehicle should be employed to achieve a greater degree of specificity? Or, does *Crawford-El* impose no heightened pleading requirement, as the District of Columbia and Seventh Circuits have concluded?

Mr. Erikson respectfully submits that under any of these formulations, he should prevail as he was abruptly and prematurely dismissed from court.

The Tenth Circuit also concluded that Mr. Erikson did not adequately plead the lack of "probable cause." The

appellate court stated that the allegations were not sufficiently specific on this issue.[4] *Erikson*, 263 F.3d at 1154. The Complaint shows that Erikson alleged that the prosecution was "malicious" and lacking in sufficient evidence. If these allegations are deemed insufficient, the court may certainly construe the Objections to the Magistrate's Report as seeking leave to amend. In that pleading, Erikson alleged that physical evidence may have been tampered with in an effort to engineer probable cause when in fact no such probable cause existed. App. at 50a-51a.

At a minimum, *Crawford-El* would appear to suggest that Erikson should have been granted the opportunity to reply or file a more definite statement. Dismissal was not an appropriate remedy at that stage, particularly given the lack of clear-cut authority as to whether heightened pleading requirements may indeed be properly applied to civil rights cases against individual defendants.

Thus, the Court of Appeals' requirement of specific pleading in this case was not based on a clear-cut authority and had the result of defeating, with no consideration on the merits, a serious civil rights lawsuit. These actions by the district court and the court of appeals violated Mr. Erikson's right to due process and should be remedied by this Court.

---

[4] The Tenth Circuit did not analyze the claim in terms of the establishment of probable cause through fraud. However, state of mind would always be at issue because proving what law enforcers knew or were motivated by would be necessary under any formulation of the probable cause issue.

II THE DISMISSAL WITHOUT PROVIDING AN OPPORTUNITY TO AMEND WAS IN CONFLICT WITH CONTROLLING AUTHORITY OF THIS COURT AND WITH FUNDAMENTAL POLICIES BEHIND THE FEDERAL RULES OF CIVIL PROCEDURE

As amply discussed above, Mr. Erikson could have easily supplied the specific allegations which the Court of Appeals found missing. He could have been permitted to reply or amend. The district court could have required a more definite statement under Rule 12(e). The district court's precipitous action and the Tenth Circuit's affirmance of it run contrary to the spirit and intent of the Rules of Civil Procedure and also contravene the requirements of the Due Process Clause.

On page 5 of his Objection to the Magistrate's Report, Mr. Erikson's counsel stated that he was prepared to allege that the charges would not have been filed if it were not for the interference of private interests. App. at 52a.

In upholding dismissal, the Court of Appeals relied on the lack of allegation that the private interests actually controlled prosecutorial decision-making.

Also, as stated in the Objections to the Magistrate's Report, Erikson was prepared to allege that tampering with the crime scene resulted in probable cause being manufactured through fraud. App. at 50a-51a.

Thus, it appears likely that two alleged pleading defects at issue here could have been easily cured through timely amendment by relying on allegations that had already been presented to the district court.

Failure to offer the opportunity to cure through amendment is contrary to this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962) (amendments to pleadings are to be freely allowed, even after a complaint has been dismissed). Further, the liberal pleading decisions of this Court recognize: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome. . . . " *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

The writ should be granted because the dismissal without allowing amendment is contrary to well-established provisions of federal law, including the Fifth Amendment of the United States Constitution.

CONCLUSION

Based on the foregoing arguments and authorities, Mr. Erikson respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

MARK BARRETT OK #557
Counsel of Record
P.O. Box 896
Norman, OK 73070
(405) 364-8367
Attorney for Petitioner

CHERYL A. PILATE MO #42266
WYRSCH HOBBS &
MIRAKIAN, P.C.
1101 Walnut, Suite 1300
Kansas City, MO 64106
(816) 221-0080 Telephone
(816) 221-3280 Facsimile
Attorney for Petitioner

FILED
United States Court of Appeals
Tenth Circuit

AUG 23 2001

PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MICHAEL ED ERIKSON,

Plaintiff-Appellant,

No. 00-5190

v.

PAWNEE COUNTY BOARD OF COUNTY COMMISSIONERS, Pawnee County, an Oklahoma political subdivision, ex rel.; LARRY STUART, in his official capacity as District Attorney for Osage and Pawnee Counties; HARLAND STONECIPHER, individually and as President of the Oklahoma Sportsman's Association; OKLAHOMA SPORTSMAN'S ASSOCIATION; MICHAEL TURPEN, individually and as an employee and Shareholder of the law firm Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc.; RIGGS, ABNEY, NEAL, TURPEN, ORBISON, & LEWIS, INC., an Oklahoma professional corporation,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 99-CV-786-BU)

Submitted on the briefs:

Brett D. Sanger of Brett D. Sanger, P.C., Oklahoma City, Oklahoma, for Plaintiff-Appellant.

S.M. Fallis, Jr., of Nichols, Wolfe, Stamper, Nally, Fallis & Robertson, Inc., and Douglas A. Wilson of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., Tulsa, Oklahoma, for Defendants-Appellees.

Before SEYMOUR and McKAY, Circuit Judges, and BRORBY, Senior Circuit Judge.

SEYMOUR, Circuit Judge.

Plaintiff Michael Ed Erikson is appealing the district court's dismissal of his civil rights claims brought under 42 U.S.C. § 1983.[1] The district court dismissed plaintiff's case under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. We review the district court's dismissal de novo "accepting the well-pleaded allegations of the complaint as true and construing them in the light most favorable to the plaintiff." *Yoder v. Honeywell, Inc.*, 104 F.3d 1224 (10th Cir. 1997) (quotation omitted). We affirm.

---

[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

I.

On June 26, 1992, plaintiff shot and killed Tony McCollum and Fred Head on his family's ranch property. Although plaintiff claimed he killed McCollum and Head in self defense, he was subsequently charged with two counts of first degree murder in Pawnee County, Oklahoma. At plaintiff's trial, the jury was instructed on murder, voluntary manslaughter, and self defense, and acquitted plaintiff on all charges for the death of Head. The jury could not reach a unanimous verdict with respect to the charges for the death of McCollum, and a mistrial was declared. Plaintiff was retried on the charge of voluntary manslaughter for the death of McCollum. At the second trial, the jury again failed to reach a unanimous verdict on the manslaughter charge, and another mistrial was declared. A third prosecution on the charge of voluntary manslaughter for the death of McCollum was dismissed without prejudice.

Plaintiff then filed suit against defendants under § 1983 alleging that they violated his federal civil rights by conspiring to prosecute him for the deaths of Head and McCollum without probable cause or sufficient evidence. Plaintiff further alleged that his federal due process rights were violated because the private defendants (the Oklahoma Sportsman's Association (OSA), Harland Stonecipher, who is the president of the OSA, and attorney Michael Turpen and his law firm, who represented the Head and McCollum families) actively participated in and influenced the state prosecution. Specifically, plaintiff alleged the OSA raised in excess of $25,000 from its membership and contributed the money to defendant

Turpen for use in providing research assistants and investigators to assist defendant Stuart in prosecuting plaintiff.[2] Plaintiff also asserted state law claims against defendants for malicious prosecution, malicious abuse of process, civil conspiracy, intentional infliction of emotional distress, and punitive damages.

Defendants filed motions to dismiss under Fed. R. Civ. P. 12(b)(6). The magistrate judge recommended that the district court grant the motions on the grounds that: (1) under Oklahoma law, a district attorney is an arm of the state and thus defendant Pawnee County is not liable for the official acts of defendant Stuart, *see Arnold v. McClain*, 926 F.2d 963, 965-66 (10th Cir. 1991); (2) as a state officer under Oklahoma law, defendant Stuart is entitled to Eleventh Amendment immunity from actions against him in his official capacity, *see id.* at 966; (3) defendant Stuart is not liable to plaintiff in his individual capacity because: (a) he is entitled to absolute prosecutorial immunity from suits under § 1983, *see Imbler v. Pachtman*, 424 U.S. 409, 427 (1976), and (b) he is entitled to qualified immunity because plaintiff failed to allege sufficient facts showing he violated a clearly established federal statutory or constitutional right, *see Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982);[3] and (4) plaintiff failed

---

[2] Plaintiff alleges that Oklahoma law prohibited defendant Stuart from accepting assistance from the private defendants in prosecuting plaintiff. We agree with the conclusion of the magistrate judge that, without more, any such violation of state law is not actionable under § 1983.

[3] Plaintiff contends he could have overcome defendant Stuart's qualified immunity defense if the district court had permitted him to file an amended complaint. However, after

to state a claim against the private defendants under § 1983 because he failed to allege sufficient facts to show their conduct violated a federal statutory or constitutional right. The district court accepted the magistrate judge's recommendations and granted defendants' motions to dismiss.

II.

We agree with the magistrate judge's analysis. For additional reasons not expressly articulated by the magistrate judge, we also agree that plaintiff has failed to allege a federal constitutional violation. First, the participation of a privately-retained attorney in a state criminal prosecution does not violate the defendant's right to due process under federal law unless the private attorney effectively controlled critical prosecutorial decisions. *See East v. Scott*, 55 F.3d 996, 1000-01 (5th Cir. 1995); *Person v. Miller*, 854 F.2d 656, 663-64 (4th Cir. 1988). Such decisions include "whether to prosecute, what targets of prosecution to select, what investigative powers to utilize, what sanctions to seek, plea bargains to strike, or immunities to grant." *Person*, 854 F.2d at 664. Plaintiff has not alleged that defendant Turpen exercised control over any critical prosecutorial decisions. Instead, plaintiff only alleges that

---

defendants filed their motions to dismiss, plaintiff only sought leave to amend with respect to defendant Stuart to assert a claim against him in his individual capacity without requesting leave to amend any of the substantive allegations in his complaint. Moreover, plaintiff has failed to identify any additional relevant facts that he could have included in an amended complaint to defeat defendant Stuart's qualified immunity defense.

defendant Turpen, acting on behalf of the OSA, provided research assistants and investigators to assist defendant Stuart. This is insufficient to state a claim for a federal due process violation.[4]

Second, plaintiff has failed to allege sufficient facts to support a Fourth Amendment claim for malicious prosecution under § 1983. In this circuit, state law provides the starting point for analyzing a Fourth Amendment claim for malicious prosecution under § 1983. *See Taylor v. Meacham*, 82 F.3d 1556, 1561-62 (10th Cir. 1996). Under Oklahoma law, a lack of probable cause to bring a criminal prosecution is an essential element of the tort of malicious prosecution. *See Parker v. City of Midwest City*, 850 P.2d 1065, 1067 (Okla. 1993). Here, beyond the conclusory allegation in his complaint that no probable cause existed, plaintiff has not alleged any specific facts showing there was a lack of probable cause for his arrest and

---

[4] In *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 809 (1987), the Supreme Court held that an attorney for a party in a position to gain from a criminal contempt proceeding cannot be appointed by the district court to prosecute the party charged with contempt. The Court determined that, because of the inherent conflict of interest and potential for misconduct, the use of an interested private attorney to prosecute a contempt citation is fundamental error. *Id.* at 814. *Young* is distinguishable because, unlike the situation here, the private attorney was the government's sole representative in the contempt trial, *see East*, 55 F.3d at 1000 n.2, and he had complete authority over all aspects of the prosecution, *see Person*, 854 F.2d at 662-63. *Young* is also distinguishable on the grounds that the Supreme Court decided the case under its supervisory power over the federal courts, and not as a matter of federal constitutional law. *See Young*, 481 U.S. at 790; *East*, 55 F.3d at 1000 n.2.

prosecution on the charges of first degree murder. Plaintiff's conclusory allegation is insufficient to survive defendants' motions to dismiss. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (stating that "conclusory allegations without supporting factual averments are insufficient to state a claim"); *Bryson v. City of Edmond*, 905 F.2d 1386, 1390 (10th Cir. 1990) (stating that district court is not required to accept "footless conclusions of law" in ruling on motion to dismiss).[5]

Finally, plaintiff has alleged a number of additional wrongs in connection with his criminal prosecution, including that: (1) state law enforcement officials contorted his voluntary statements; (2) the OSA issued false media releases; (3) unidentified OSA members disrupted plaintiff's trials and made death threats to plaintiff; (4) the hold-out juror for a conviction in plaintiff's first trial was a friend of McCollum's and he perjured himself to

---

[5] Plaintiff has also failed to state a claim under federal law for abuse of process. As with claims for malicious prosecution, state law provides the elements for a claim of abuse of process under § 1983. *See Cook v. Sheldon*, 41 F.3d 73, 79-80 (2d Cir. 1994). Under Oklahoma law, an "ulterior or improper purpose" is an essential element of the tort of abuse of process. *Callaway v. Parkwood Village, L.L.C.*, 1 P.3d 1003, 1004 (Okla. 2000). Because plaintiff has failed to allege facts showing that defendants conspired to prosecute him with an ulterior or improper motive separate and apart from the alleged desire to obtain first degree murder convictions without probable cause, plaintiff's allegations should only be analyzed in terms of an attempt to plead a claim for malicious prosecution. *See Wolford v. Lasater*, 78 F.3d 484, 490 (10th Cir. 1996) (explaining differences between abuse of process and malicious prosecution and holding that challenge to allegedly baseless criminal prosecution is more appropriately characterized as claim for malicious prosecution).

become a juror; and (5) defendants caused a groundless civil suit to be filed against plaintiff. While these allegations are troubling, plaintiff has failed to articulate a federal constitutional claim based on any of these alleged wrongs, and/or he has failed to link any of the named defendants to the alleged misconduct.

We AFFIRM the district court's order of dismissal.[6]

---

[6] The district court's order of dismissal did not specifically address plaintiff's state law claims. However, plaintiff has not raised any issues on appeal with respect to his state law claims, and we will assume that, pursuant to 28 U.S.C. § 1367(c)(3), the district court has declined to exercise supplement jurisdiction over the state law claims. *Cf. Taylor*, 82 F.3d at 1564, n.11 (affirming district court order granting defendant summary judgment in § 1983 case even though district court failed to specifically address plaintiff's state law claims).

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHAEL ED ERIKSON,

Plaintiff-Appellant,

v.

PAWNEE COUNTY BOARD OF COUNTY COMMISSIONERS, Pawnee County, an Oklahoma political subdivision, ex rel.; LARRY STEWART, in his official capacity as District Attorney for Osage and Pawnee Counties; HARLAND STONECIPHER, individually and as President of the Oklahoma Sportsman's Association; OKLAHOMA SPORTSMAN'S ASSOCIATION; MICHAEL TURPEN, individualy [sic] and as an employee and sharelolder [sic] of the law firm Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc.; RIGGS ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC., an Oklahoma professional corporation,

Defendants-Appellees.

No. 00-5190
D.C. No.
99-CV-786-BU
(Northern District
of Oklahoma)

JUDGMENT

Filed August 23, 2001

Before **SEYMOUR, McKAY** and **BRORBY**, Circuit Judge.

This case originated in the Northern District of Oklahoma and was submitted on the briefs at the direction of the court.

The judgment of that court is affirmed.

Entered for the Court
PATRICK FISHER, Clerk

by: /s/ Lisa Sallgos
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL ED ERIKSON, Plaintiff, vs. PAWNEE COUNTY, an Oklahoma political subdivision, ex rel, BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, et al., Defendants.	)	Case No. 99-CV-786-BU(M)

ORDER

(Filed Aug. 18, 2000)

On June 20, 2000, United States Magistrate Judge Frank H. McCarthy issued a Report and Recommendation, wherein he recommended that the Motion to Dismiss of Defendant Larry Stuart, the Motion to Dismiss of Pawnee County, the Motion to Dismiss of Defendant Oklahoma Sportsman's Association, the Motion to Dismiss of Defendant Harland Stonecipher and the Motion to Dismiss of Michael Turpen and Riggs, Abney, Neal, Turpen, Orbinson & Lewis, Inc. be granted, that the Motion to Join Additional Party Defendant be denied and that Pawnee County's Rule 11 Motion be denied.

Presently before the Court is Plaintiff's Objection to the Report and Recommendation of the Magistrate. Pursuant to 28 U.S.C. § 636(b)(1), the Court has conducted a de novo review of the Report and Recommendation to

which objections were made.[1] Having done so, the Court agrees with Magistrate Judge McCarthy's Report and Recommendation. The Court finds that Plaintiff's objections to the Report and Recommendation are without merit.

Accordingly, the Report and Recommendation (Docket Entry #66-1) issued by the United States Magistrate Judge Frank H. McCarthy is **AFFIRMED**. The Motion to Dismiss of Defendant Larry Stuart (Docket Entry #6-1), the Motion to Dismiss of Pawnee County (Docket Entry #9-1), the Motion to Dismiss of Defendant Oklahoma Sportsman's Association (Docket Entry #29-1), the Motion to Dismiss of Defendant Harland Stonecipher (Docket Entry #30-1) and the Motion to Dismiss of Michael Turpen and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc. (Docket Entry #31-1) are **GRANTED**. The Motion to Join Additional Party Defendant (Docket Entry #13-1) is **DENIED**. Pawnee County's Rule 11 Motion (Docket Entry #62-1) is **DENIED**.

ENTERED this 18 day of August, 2000.

/s/ Michael Burrage
MICHAEL BURRAGE
UNITED STATES
DISTRICT JUDGE

---

[1] The Court notes that neither Plaintiff nor Defendant, Pawnee County, submitted an objection to Magistrate Judge McCarthy's recommendation that Pawnee County's Rule 11 Motion be denied. With no objection being filed, the Court accepts Judge McCarthy's recommendation in toto and concludes that Pawnee County's Rule 11 Motion should be denied.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

MICHAEL ED ERIKSON,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	CASE NO.
	)	99-CV-786-BU (M)
PAWNEE COUNTY, an Oklahoma political subdivision, ex rel BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY,	)	
LARRY STUART, in his official capacity as District Attorney for Osage and Pawnee Counties,	)	
HARLAND STONECIPHER, individually and as President of the Oklahoma Sportsman's Association,	)	
OKLAHOMA SPORTSMAN'S ASSOCIATION,	)	
MICHAEL TURPEN, individually and as an employee and shareholder of the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., and	)	
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC., an Oklahoma professional corporation,	)	
	)	
DEFENDANTS.	)	

REPORT AND RECOMMENDATION

(Filed Jun. 20, 2000)

This report and recommendation addresses the following motions which have been referred to the undersigned United States Magistrate Judge: the Motion to Dismiss of Defendant Larry Stuart [Dkt. 6-1]; the Motion to Join Additional Party Defendant [Dkt. 13-1]; the Motion to Dismiss of Pawnee County [Dkt. 9-1]; the Motion to Dismiss of Defendant Oklahoma Sportsman's Association [Dkt. 29-1]; the Motion to Dismiss of Defendant Harland Stonecipher [Dkt. 30-1]; the Motion to Dismiss of Defendants Michael Turpen and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc. [Dkt. 31-1]; and Defendant Pawnee County's Rule 11 Motion [Dkt. 62-1].

Standard of Review for Motion To Dismiss

The Defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) should be granted only if it appears that Plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *Maez v. Mountain States Tel. & Tel. Inc.*, 54 F.3d 1488 (10th Cir. 1995). All well pleaded factual allegations in Plaintiff's complaint must be accepted as true and the Court will indulge all inferences in Plaintiff's favor. *Lafoy v. HMO Colorado*, 988 F.2d 97 (10th Cir. 1993).

Factual Allegations in Plaintiff's Complaint

Plaintiff alleges that on June 26, 1992, while acting in self-defense, he shot and killed Fred Head, Jr. and Tony

McCollum. Less than two days after the incident, Defendant Oklahoma Sportman's Association and Defendant Harland Stonecipher published media releases which, among other things, encouraged hunters to raise money for the prosecution of Plaintiff. On June 29, 1992, Defendant Michael Turpen called the Pawnee County District Attorney's office and advised Defendant Larry Stuart that he (Turpen) was representing the victims in the case against Plaintiff and indicated his (Turpen's) desire to be appointed as special prosecutor for the charges against Plaintiff. On June 30, 1992, Plaintiff was formally charged with two counts of first degree murder.

The Oklahoma Sportman's Association raised in excess of $25,000 to pursue and assist in the prosecution of Plaintiff. The money was given to Turpen at the law firm of Defendant Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc. and was used to provide research assistance and investigators to Defendant Larry Stuart specifically for the prosecution of Plaintiff.

During the state court criminal proceedings the Court found probable cause to be established and held Plaintiff for trial on two counts of first degree murder. At the conclusion of the first trial, Plaintiff was acquitted of all charges concerning the death of Mr. Head and the jury did not reach a decision on the charge against Plaintiff for the death of Mr. McCollum. Plaintiff was tried a second time on criminal charges relating to the death of Mr. McCollum; again the jury failed to reach a verdict. In September 1998, shortly before Plaintiff's third trial for the death of Mr. McCollum, the Court dismissed the case without prejudice.

Pawnee County's Motion To Dismiss

Pawnee County seeks dismissal on the basis that the county is not liable for any actions of the District Attorney and that Plaintiff has not asserted any claims against the county independent of the actions of the District Attorney. *Arnold v. McClain*, 926 F.2d 963 (10th Cir. 1991); *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990).

Plaintiff does not deny that under the law Pawnee County is not responsible for the acts of the District Attorney. However, Plaintiff contends that the county may have had some involvement with the private funds used to assist in Plaintiff's prosecution or otherwise participated in Plaintiff's "wrongful prosecution."

Plaintiff's vague allegations unsupported by any specific factual assertions against Pawnee County are insufficient to defeat the motion to dismiss. In response to a motion to dismiss, Plaintiff must present specific factual allegations. *See Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988) (citing *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987)) (plaintiff is required to "come forward with facts or allegations sufficient to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred.)

Based upon the above, the undersigned RECOMMENDS that Pawnee County's Motion To Dismiss [Dkt. 9-1] be GRANTED.

Pawnee County's Rule 11 Motion

Defendant Pawnee County requests dismissal of Plaintiff's case against Pawnee County and other appropriate sanctions under Fed. R. Civ. P. 11. In light of the recommendation that the case be dismissed pursuant to Rule 12(b)(6), the undersigned does not recommend dismissal under Rule 11. Further, Pawnee County has not persuaded the undersigned that any sanction is appropriate under Rule 11. Therefore, the undersigned RECOMMENDS that Pawnee County's Rule 11 motion be DENIED.

Larry Stuart's Motion to Dismiss

Defendant Stuart has been sued in his official capacity as District Attorney for Osage and Pawnee Counties. A suit against a state official in his or her official capacity is a suit against the state. *Will v. Michigan Dep't. of State Police, et al.*, 491 U.S. 58, 105 L. Ed. 2d 45 (1989); *Kentucky v. Graham*, 473 U.S. 159, 87 L.Ed. 2d 114 (1985). The State of Oklahoma and its agencies are entitled to Eleventh Amendment immunity in this action. *Florida Dep't. of Health & Rehabilitative Services v. Florida Nursing Home Assn.*, 450 U.S. 147, 67 L. Ed. 2d 132 (1981).

In his response, Plaintiff concedes that Eleventh Amendment immunity shields Defendant Stuart from monetary liability but urges that he may maintain an action against Defendant Stuart in his official capacity for prospective declaratory relief. Plaintiff's complaint does not state a claim for prospective declaratory relief nor does Plaintiff's response to Defendant Stuart's motion set forth a basis for such relief. The undersigned therefore

RECOMMENDS that the motion to dismiss of Larry Stuart, in his official capacity as District Attorney for Osage and Pawnee Counties [Dkt. 6-1], be GRANTED.

Plaintiff's Motion to Join Additional Party Defendant

Plaintiff requests that Larry Stuart, individually, be joined as a defendant in this case. In his official capacity Defendant Larry Stuart has lodged an objection, arguing that such an addition would be futile because, even in his individual capacity, Larry Stuart would be entitled to absolute prosecutorial immunity and qualified immunity.

A prosecutor is absolutely immune from damages for his or her actions in initiating or pursuing a criminal prosecution and in presenting the state's case. *Imbler v. Pachtman,* 424 U.S. 409, 47 L. Ed. 2d 128 (1976). This absolute immunity encompasses not only the conduct of the trial but all of the activities that can fairly be characterized as closely associated with the conduct of the litigation.

Although Plaintiff acknowledges the absolute immunity afforded to prosecutors, he argues that not all claims for damages against prosecutors are precluded by absolute immunity. Plaintiff contends that the Court must examine the specific conduct at issue to determine if absolute prosecutorial immunity applies. Plaintiff contends that Defendant Stuart conspired with the Oklahoma Sportman's Association, Harland Stonecipher and Michael Turpen at the law firm of Riggs, Abney, Neal, Turpen, Orbison and Lewis, Inc., to raise private funds to use in his prosecution. Such actions, Plaintiff claims, are

not\covered by prosecutorial immunity. However, Plaintiff's own description of the alleged wrongdoing indicates that the activities were undertaken specifically for the purpose of prosecuting him. As such, these activities are characterized as being closely associated with the conduct of the litigation and therefore fall within the protection of absolute prosecutorial immunity.

Defendant Stuart further contends that in his individual capacity, he would be protected by qualified immunity. Government officials performing discretionary functions enjoy qualified immunity from civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L. Ed. 2d 396 (1982). A plaintiff confronted with a defense of qualified immunity bears the burden of establishing that the law was both clearly established and that the defendant's conduct was unreasonable under the applicable standard. *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642 (10th Cir. 1988). Plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant violated it.

Although Plaintiff makes vague allegations that he was denied the right to a fair and impartial trial, the only specific factual allegations made by Plaintiff are that Stuart and the other defendants conspired to solicit and accept private monies to assist in his prosecution. Plaintiff does not articulate what constitutional right was allegedly violated by these activities. Plaintiff points to 19 Okla. Stat. §215.4 and claims that the duties of an Oklahoma District Attorney were violated. However, without more this is not actionable under Section 1983. *Davis v.*

Scherer, 468 U.S. 183, 194, 104 S.Ct. 3012, 3019, 82 L.Ed.2d 139 (1984) (Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision).

Based upon the foregoing analysis, the undersigned RECOMMENDS that Plaintiff's Motion to Join Additional Party Defendant [Dkt. 13-1] be DENIED as Plaintiff would be unable to state a claim upon which relief may be granted against Larry Stuart in his individual capacity.

Motions to Dismiss of Stonecipher, Oklahoma Sportman's Association, Turpen and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc.

Plaintiff grounds his federal cause of action against these private defendants on an allegation of a conspiracy to violate his civil rights under Section 1983. In turn, Plaintiff grounds his conspiracy claim against each of these defendants on his factual allegation that they participated in a scheme to solicit and accept private monies to aid the prosecution of Plaintiff. However, as noted above, Plaintiff fails to identify a federal constitutional or federal statutory right which would be violated by Defendants' alleged conduct. *See Jones v. Richards*, 776 F.2d 1244 (4th Cir. 1985) (no constitutional right impaired by involvement of private attorneys as prosecutors in criminal trial).

Further, the state court finding of probable cause sufficient to hold Plaintiff for trial precludes this issue in federal court, *Hubbert v. City of Moore*, 923 F.2d 769 (10th Cir. 1991) and thereby defeats any claim for a Section

1983 violation for malicious prosecution. *Wolford v. Lasater*, 78 F.3d 484 (10th Cir. 1996). And, Plaintiff's allegations of abuse of process do not state a Section 1983 claim. *Spear v. Town of West Hartford*, 954 F.2d 63 (2nd Cir. 1992).

Additionally, these defendants contend that Plaintiff's claims are barred by the Statute of Limitations and First Amendment immunity under the Noerr-Pennington Doctrine. *Eastern R. R. Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464 (1961) and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 14 L. Ed. 2d 626 (1965). The undersigned has not reached these issues based upon the recommended disposition of the motions on other grounds.

Based upon the above, the undersigned RECOMMENDS that the Motions To Dismiss of Defendants Stonecipher, Oklahoma Sportman's Association, Turpen and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., [Dkt. 9-1, 29-1, 30-1, 31-1] be GRANTED.

Conclusion

The undersigned United States Magistrate Judge RECOMMENDS that: the Motion to Dismiss of Defendant Larry Stuart [Dkt. 6-1] be GRANTED; the Motion to Join Additional Party Defendant [Dkt. 13-1] be DENIED; the Motion to Dismiss of Pawnee County [Dkt. 9-1] be GRANTED; the Motion to Dismiss of Defendant Oklahoma Sportsman's Association [Dkt. 29-1] be GRANTED; the Motion to Dismiss of Defendant Harland Stonecipher [Dkt. 30-1] be GRANTED; the Motion to Dismiss of

Defendants Michael Turpen and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., [Dkt. 31-1] be GRANTED; and Pawnee County's Rule 11 Motion [Dkt. 62-1] be DENIED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the District Court for the Northern District of Oklahoma within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Haney v. Addison,* 175 F.3d 1217, 1219-20 (10th Cir. 1999), *Talley v. Hesse,* 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States,* 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 20th day of June, 2000.

/s/ Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR NORTHERN DISTRICT OF OKLAHOMA

(1) MICHAEL ED ERICKSON,

Plaintiff,

vs.

(1) PAWNEE COUNTY, an Oklahoma political subdivision, ex rel, BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY,

(2) LARRY STUART, in his official capacity as District Attorney for Osage and Pawnee Counties,

(3) HARLAND STONECIPHER, individually and as President of the Oklahoma Sportsman's Association,

(4) OKLAHOMA SPORTSMAN'S ASSOCIATION,

(5) MICHAEL TURPEN, individually and as an employee and shareholder of the law firm of Rigs, Abney, Neal, Turpen, Orbison & Lewis, Inc., and,

(6) RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, INC., an Oklahoma professional corporation,

Defendants.

Case No. 99CV0786BU(M)

COMPLAINT

(Filed Sep. 16, 1999)

COMES NOW the Plaintiff, Michael Ed Erikson, and for his causes of action against the Defendants, alleges and states as follows:

JURISDICTION

1. This is an action to recover damages pursuant to Title 42 of the United States Code, §§ 1983 and 1988. The statutes provide a civil right of action under the Fourteenth Amendment to the Constitution of the United States. Jurisdiction of this Court is predicated on Title 28 of the United States Code §§ 1331 and 1343.

2. Pursuant to Title 28 of the United States Code § 1367 Supplemental, the Plaintiff further invokes the pendant jurisdiction of this Court to consider any and all claims arising under applicable state law which normally would be tried in one single proceeding.

3. Concurrent with the filing of the instance action, Plaintiff has filed a Governmental Tort Claims, pursuant to 51 O.S. §§ 151, et seq., against Pawnee County, a political subdivision of the State of Oklahoma.

PARTIES

4. Michael Erikson is a resident of Alva, Woods County, Oklahoma.

5. Pawnee County is a political subdivision of the State of Oklahoma, United States of America located in

the United States District Court, Northern District of Oklahoma.

6. Larry Stuart is the acting District Attorney for Osage and Pawnee Counties and was acting District Attorney during all operative times with regard to this action and the incident in question.

7. Mike Turpen is a shareholder in the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc., an Oklahoma professional corporation and former Attorney General of the State of Oklahoma.

8. The Oklahoma Sportsman's Association ("OSA") is an Oklahoma Association organized for the purpose of hunting and the promotion of hunting related activities and lobbying for hunter's rights.

9. Harland Stonecipher, at all operative times with regard to this action and the incident in question, was acting president of the OSA, a businessman and majority shareholder of Prepaid Legal Services, Inc., an Oklahoma corporation, of which Mike Turpen's law firm, Riggs, Abney, Neal, Turpen, Orbison & Lewis is or was acting general counsel.

THE INCIDENT

10. The incident that occurred which the instant causes of action are founded are summarized as follows:

(a) On or about June 26, 1992, Michael Erikson acted in self defense in the shooting deaths of Fred Head, Jr. and Tony McCollum.

(b) Michael Erikson was wrongfully charged with and tried for two (2) counts of first degree

murder and Pawnee County wrongfully prosecuted Mr. Erikson and sought the death penalty.

(c) The first trial resulted in Michael Erikson's acquittal for the death of Fred Head, Jr. and an eleven to one (11-1) vote for acquittal for the death of Tony McCollum.

(d) Michael Erikson was retried for the death of Tony McCollum which again resulted in a hung jury.

(e) Pawnee County again sought to retry Michael Erikson for voluntary manslaughter for the death of Tony McCollum which was later dismissed by the District Attorney.

FACTUAL ALLEGATIONS

11. Michael Erikson's (hereinafter "Erikson" and/or "Plaintiff") family farms and conducts ranching operations in rural Payne and Pawnee Counties in the State of Oklahoma. They are well respected in the community, and known as law-abiding citizens.

12. Erikson's family had encountered prior incidents of cattle theft and trespassing on their property on numerous occasions which caused substantial concerns to both Erikson and his family.

13. On the night of June 26, 1992, while watching his family's property in rural Pawnee County, Erikson was confronted and accosted by two (2) men, namely, Fred Head, Jr. ("Head") and Tony McCollum ("McCollum").

14. After being repeatedly beaten with a dog chain and suffering life threatening assault and battery, Erikson, acting out of self-defense, necessary to save his life, shot and killed both Head and McCollum.

15. Both Head and McCollum were known in the local community as dangerous individuals that had a colorful and notorious history of abusing and physically accosting others in the community.

16. Fred Head and possibly McCollum were known by the Plaintiff and the local community to carry firearms and other dangerous weapons on their person on a continual basis.

17. Both Head and McCollum were avid raccoon hunters.

18. Head and McCollum were known to have little or no respect for landowners' rights and based upon information and belief, regularly trespassed upon landowners' private property during their hunting expeditions.

19. Head and McCollum had prior criminal records, including physical violent assaults. Erikson and his family had been threatened by the two (2) men on previous occasions.

20. Based upon the information and belief, Head, McCollum and a third individual, Earl Coke, and/or his son, Earl Coke, Jr., had under no uncertain circumstances, intended to murder Michael Erikson on the night of June 26, 1992.

21. Prior to the referenced incident, Head was trespassing on Erikson's land and during a confrontation advised Erikson that he had shot and/or killed other men and in fact he would kill Erikson as well. Erikson considered Head's threats serious.

22. Erikson reported the threats made by Head to the Payne and Pawnee County Sheriffs' Departments and was advised to report any future incidents.

23. On the evening of June 26, 1992, as a result of a violent attack on his life, Plaintiff shot and killed Head and McCollum while acting in self defense.

24. Immediately after the shootings, Erikson drove to a nearby neighbor's house and instructed the neighbor to telephone law enforcement officials. Erikson promptly returned to the scene to wait for law enforcement.

25. During the initial investigation by law enforcement, Erikson voluntarily reenacted the events and was transported to the Payne County Jail whereby Erikson offered a voluntary written statement and was interrogated for several hours regarding the incident.

26. Erikson was certain he had committed no wrong; therefore, he waived his right to counsel. Unbeknownst to Erikson, law enforcement, whom he considered to be a protector of justice, would contort his voluntary statement and admissions to be used against him in charges of two (2) counts of first degree murder with the death penalty imposed.

27. After three (3) days of confinement in the Payne County Jail, Erikson was transported to Pawnee County. Upon leaving the Payne County Jail, Erikson was advised

that charges would likely not be filed. Upon arriving in Pawnee County, however, Erikson was advised that two (2) counts of first degree murder would be filed. Although both affidavits of probable cause indicate the incident took place in Payne County and despite the fact that no charges had been filed, Erikson continued to be held without a bond in the custody of the Pawnee County Sheriff.

28. Less than two (2) days after the incident, the OSA, lead by Harland Stonecipher, began to actively conspire to cause Erikson to be unlawfully tried for crimes he did not commit. The only facts present indicated clearly that Erikson acted in self-defense or he would have been murdered the night of June 26, 1999 [sic]. Without on scintilla of verifiable evidence, the OSA via Harland Stonecipher published untruthful media releases alleging Erikson had shot hunters in the road without cause and encouraged hunters to " . . . raise money for the prosecution. . .".

29. On June 29, 1992, the Monday following the Friday night shooting, Mike Turpen called the Pawnee County District Attorney's office and advised Larry Stuart that he was representing the victims in the case against Erikson. Remarkably, shortly thereafter, Mike Turpen and/or his office telephoned the Pawnee County District Attorney's office again indicating he was desirous of being appointed as special prosecutor in the charges against Michael Erikson.

30. On June 30, 1992, Erikson was formally charged with two (2) counts of first degree murder.

31. The OSA raised in excess of $25,000 from its membership specifically to pursue and assist in the prosecution of Erikson which was then "contributed" to former Attorney General, Mike Turpen, at the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis, in an effort to fund the unlawful prosecution of Erikson. Presently, it is unknown whether the OSA volunteered the contribution to be donated to Pawnee County for the malicious prosecution of Erikson or whether District Attorney, Larry Stuart requested the funds for prosecution assistance.

32. Based upon information and belief, instead of being appointed special prosecutor, Turpen provided research assistants and investigators to Larry Stuart to be assigned specifically to the Erikson case, paid for with the funds provided by the OSA.

33. A Bill of Particulars was filed against Erikson citing two (2) counts of first degree murder with the death penalty imposed. Erikson was held over for trial and three (3) months passed before his bond hearing occurred. Remarkably, Erikson's bond was set at a mere $50,000 despite the fact he was facing the death penalty.

34. The OSA remained actively involved throughout the trials. Its membership made death threats to Erikson and his family. Based upon information and belief, Turpen, Stonecipher and/or Larry Stuart caused a groundless civil suit to be filed in Pawnee County not only against Erikson for alleged wrongful deaths of Head and McCollum, but also named Erikson's parents as defendants as well. The suit was dismissed by the Plaintiffs soon after it was filed.

35. Erikson was tried for two (2) counts of first degree murder in Pawnee County. OSA members attended the eight (8) day trial along with Mike Turpen and Harland Stonecipher. During the trial, OSA members intimidated Erikson and his family, passed hand-drawn pictures to Erikson's legal counsel with guns pointed to their heads, made death threats to Erikson and his immediate family and went as far as to attempt to spit on Erikson's legal counsel after the acquittal. Sheriffs and highway patrolmen restrained OSA members and escorted Erikson's legal counsel from Pawnee County after the trial.

36. Despite the disruption that occurred in the courtroom, the jury acquitted Erikson on the murder and on the lesser included charge of voluntary manslaughter for the death of Head.

37. The jury deliberated and returned an eleven to one (11-1) vote in favor of acquittal for McCollum's death. After the verdict, jurors were polled and it was confirmed that the one (1) juror who refused to deliberate was a friend of McCollum's and had, in fact, perjured himself to become a jury member. The remaining jurors stated there was no way Erikson acted in any manner other than in self-defense.

38. Despite an affidavit from fellow jurors evidencing the jury misconduct, no perjury charges were brought against Tony McCollum's friend and obvious ally.

39. Allegedly, at the urging of the OSA, a second Bill of Particulars for first degree murder was filed against Erikson for the death of McCollum. The same disruption and misbehavior transpired in the courtroom,

yet the jury returned an eight to four (8-4) verdict to acquit Erikson on all counts.

40. While most uninfluenced and unbiased prosecutors would realize a jury of Erikson's peers was not going to convict Erikson because his actions were clearly in self-defense, at the urging of the OSA and other unknown sources, Pawnee County relentlessly pursued an amended charge of voluntary manslaughter against Erikson.

41. At this point, Erikson's family had spent in excess of $600,000 to defend Pawnee County's meritless claims and was financially exhausted. Erikson dismissed his legal counsel for lack of additional funds and represented himself *pro se* through the rest of the proceedings.

42. Erikson repeatedly requested a public defender but was denied until he produced his family's financial statements. Several months passed and finally, a public defender was appointed for Erikson's defense.

43. It was not until approximately fifteen (15) days before the commencement of the third Erikson trial, that Larry Stuart offered Erikson a plea bargain. although there was absolutely no change in evidence, Mr. Stuart offered Erikson a deferred voluntary manslaughter plea with a five (5) year deferred sentence and expungement after five (5) years. Because Erikson knew he had committed no crime and had been forced to defend himself for several years accordingly, he refused the District Attorney's offer.

44. Shortly prior to the third scheduled trial date, Larry Stuart advised Erikson's defense counsel he would

not oppose a motion to dismiss. A motion to dismiss was presented to the Court and granted. The Court dismissed the case without prejudice in September, 1998. Although the Court proceedings temporarily ended, Erikson continued to suffer from the wrongful and malicious prosecution monetarily and emotionally.

45. On May 17, 1999, Erikson petitioned the Court for return of his property, including the rifle used to defend himself as well as certain bullet fragments for purposes of inspection by an independent ballistics expert. Erikson's request was met with biased refusal, including innuendos and an implied threat that yet a fourth case may be filed against him. Erikson's intent regarding the return of the property was to have it examined by an independent ballistics expert because he believed evidence may have been tampered with by third parties and/or law enforcement officials.

46. The Assistant District Attorney and the Court made comments such as Erikson (1) "Murdered the two (2) men in cold blood"; and (2) "It is beyond the Court to understand why it is that Mr. Erikson could wish to have the .30 caliber fragment of the bullet removed from Fred Head's body unless it would be as a trophy or some perverse desire to have some momento from what would ordinarily be a very negative experience . . . "; and (3) the Court continued by stating "it's beyond me to understand why this Court should be a party to giving Mr. Erikson some trophy from this bad experience . . . ". Such comments were warrantless and evidence the bias and vengeance Pawnee County representatives unnecessarily harbor toward Erikson.

47. Erikson had no criminal record not even a misdemeanor driving offense, yet law enforcement wrongfully classified him as a murderer. There was not one scintilla of evidence to justify the treatment of Erikson as a murderer yet Pawnee County, by virtue of contributions from the OSA, persuaded the District Attorney of Pawnee County to maliciously prosecute Erikson for two (2) counts of first degree murder and fund and pursue two (2) maliciously prosecuted trials.

FIRST CLAIM FOR RELIEF
Malicious Prosecution

48. Plaintiff incorporates each and every allegation contained in paragraphs 1 through 47 of his Complaint.

49. Pawnee County officials, specifically Larry Stuart, maliciously prosecuted Erikson by pursuing actions and penalties of first degree murder with the death penalty imposed. Based upon the evidence submitted, Erikson's actions were clearly in self-defense.

50. Pawnee County and others conspired to maintain a malicious action against Michael Erikson with want of probable cause which eventually terminated in his favor.

51. Plaintiff is entitled to relief for the damages he sustained as a result of Defendants' actions.

SECOND CLAIM FOR RELIEF
Malicious Abuse of Process

52. Plaintiff incorporates each and every allegation contained in paragraphs 1 through 51 of his Complaint.

53. Pawnee County continuously wrongfully prosecuted Erikson through nearly a three-trial process lasting over a six (6) year period in a manner that was vengeful and biased evidenced by the dismissal of the third claim and the influence of outside sources. Pawnee County's goals were driven by the OSA and other politicians despite the fact that the state's evidence did not support the continuation of the process.

54. Plaintiff is entitled to relief for the damages he has sustained as a result of the Defendants' actions.

THIRD CLAIM FOR RELIEF
Civil Rights Violation

55. Plaintiff incorporates each and every allegation contained in paragraphs 1 through 54 of his Complaint.

56. Erikson's civil rights guaranteed by the 14th Amendment of the Constitution of the United States were violated by Pawnee County.

57. Plaintiff is entitled to relief for the damages he has sustained as a result of Defendants' actions.

FOURTH CLAIM FOR RELIEF
Civil Conspiracy

58. Plaintiff incorporates each and every allegation contained in paragraphs 1 through 57 of his Complaint.

59. Based upon the allegations contained herein, Harland Stonecipher, the OSA, Pawnee County via Larry Stuart, as well as Mike Turpen and the law firm of Riggs,

Abney, Neal, Turpen, Orbison & Lewis, Inc., civilly conspired to wrongfully prosecute Plaintiff in violation of law causing Plaintiff damages.

60. Plaintiff is entitled to relief for the damages he has sustained as a result of Defendants' actions.

FIFTH CLAIM FOR RELIEF
Intentional Infliction of Emotional Distress

61. Plaintiff incorporates each and every allegation contained in paragraphs 1 through 60 of his Complaint.

62. Defendants' collective actions caused Michael Erikson to experience severe emotional distress.

63. Plaintiff is entitled to relief for the damages he has sustained as a result of Defendants' actions.

SIX CLAIM FOR RELIEF
Punitive Damages

64. Plaintiff incorporates each and every allegation contained in paragraphs 1 through 63 of his Complaint.

65. Defendants' conduct was malicious, and willful and wanton entitling Michael Erikson to relief for the damages caused him.

WHEREFORE premises considered, Erikson requests relief from the Court in an amount to be determined at trial, including but not limited to punitive damages to punish Pawnee County and the related parties for the damages caused to Erikson, including attorney fees and costs and for such further relief at law or equity available to be awarded by the Court.

DATED this 15th day of September, 1999.

Brett D. Sanger, OBA #14850
BRETT D. SANGER, P.C.
1500 City Place Building
204 North Robinson
Oklahoma City, OK 73102
Telephone: (405) 232-1015
Facsimile: (405) 239-7795
AND
William H. Bock, OBA #13888
Michelle Rodgers, OBA #17507
WILLIAM H. BOCK, INC.
6402 N. Santa Fe, Suite A
Oklahoma City, Oklahoma 73116
Telephone: (405) 848-5400
Facsimile: (405) 848-5479
ATTORNEYS FOR PLAINTIFF

REQUEST FOR A JURY TRIAL

Plaintiff hereby demands a trial by jury.

DATED this 15th day of September, 1999.

Brett D. Sanger, OBA #14850
BRETT D. SANGER, P.C.
1500 City Place Building
204 North Robinson
Oklahoma City, OK 73102
Telephone: (405) 232-1015
Facsimile: (405) 239-7795
AND

William H. Bock, OBA #13888
Michelle Rodgers, OBA #17507
WILLIAM H. BOCK, INC.
6402 N. Santa Fe, Suite A
Oklahoma City, Oklahoma 73116
Telephone: (405) 848-5400
Facsimile: (405) 848-5479
ATTORNEYS FOR PLAINTIFF

AID TO THE COURT

TO: The Honorable Michael Burrage
United States District Judge
U.S.D.C. Northern District of Oklahoma
333 West 4th Street, Room 411
Tulsa, Oklahoma 74103

COPY TO: All Opposing Counsel

FROM: Brett D. Sanger, OBA #14850
Brett D. Sanger, P.C.
204 N. Robinson, Suite 1500
Oklahoma City, OK 73102
Attorney for Plaintiff, Michael Ed Erikson

DATE: April 8, 2000

RE: Qualified Immunity of Defendant Larry Stuart
Michael Ed Erikson v. Pawnee County, et al.
U.S.D.C. N.D. Oklahoma Case No. 99-CV-0786-BU(M)

I. INTRODUCTION

(Filed April 10, 2000)

The purpose of qualified immunity is to shield a public official in the performance of his *duties* and to prevent frivolous lawsuits against said officials to avoid lengthy legal process which could interfere with the function of the official's duties. Erikson unnecessarily devoted eight (8) years of his life in defending a frivolous prosecution for a crime he did not commit. He should, at the minimu, be entitled to conduct discovery to prove he was conspired against and prosecuted solely for the promotion of the so-called "hunting" rights of coonhunters

and/or the members of the Oklahoma Sportsman's Association ("OSA").

Defendant Larry Stuart ("Stuart") opted to file a Motion to Dismiss rather than assert his defense of qualified immunity in an answer to Plaintiff Michael Erikson's ("Erikson") allegations. The Court should assume that the facts contained in Erikson's Complaint are true and undisputed according to well-established law. The Court should also presume true the facts Erikson believes he can prove through the discovery process. Additionally, Stuart has not denied that Erikson has failed to adequately allege that Stuart is liable for a violation of Erikson's statutory and/or constitutional rights.

When raised in a motion to dismiss, the qualified immunity claim requires a two-part inquiry. First, the Court must determine if the allegations, assumed to be true, are sufficient to state a constitutional or statutory violation. If so, the Court must then ascertain whether a reasonable official in Stuart's position would have known his conduct violated Erikson's rights. Stuart participated in a conspiracy to violate Erikson's right to a fair trial, and discovery will prove Erikson's allegations.

II. FACTS TO BE PROVEN THROUGH DISCOVERY

Plaintiff believes the following facts against Stuart may be proven with the assistance of adequate discovery.

1. In violation of Oklahoma statutes, Stuart solicited (according to media publications) and/or accepted private funds for the prosecution of Erikson.

2. Stuart conspired with, by pre-prosecution contact with, Defendants Harland Stonecipher ("Stonecipher"), Michael Turpen ("Turpen"), and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc.'s ("Riggs-Abney") to prosecute Erikson for first degree murder.

3. In violation of tit. 19, O.S. § 215.4, Stuart acted privately and consulted private persons interested in the trial of a criminal case by contact with Turpen, Riggs-Abney, the OSA and Stonecipher.

4. Stuart caused the transfer of Erikson from Payne County to Pawnee County because Payne County would have refused to prosecute Erikson for first degree murder.

5. Stuart attempted to utilize faulty evidence from the scene of the incident, namely by presenting a fifth bullet fragment from the scene, for the purposes of enhancing the charges of first degree murder against Erikson, albeit the absence of a fifth shell casing from the rifle used in the incident.

6. Stuart brought repeated charges against Erikson, when a reasonable prosecutor would have known a conviction would never be obtained, solely for the purpose of obtaining a plea bargain by Erikson for the benefit of the remaining conspirators.

7. Erikson believes evidence exists that Pawnee County District Judges Scott and Revard had prior connections, including business connections, with one of the decedents, Fred Head, which may have caused a biased decision in finding probable cause to prosecute Michael Erikson for first degree murder. Plaintiff believes Stuart

may have utilized such connections to cause a determination of probable cause to continue Erikson's prosecution.

8. Stuart was aware of a juror who committed perjury in the first Erikson trial which ended in an eleven (11) to one (1) vote for acquittal because of the perjurous juror's failure to deliberate. Stuart failed to pursue perjury charges against the juror, thereby denying Erikson a right to a fair trial.

9. Erikson believes additional discovery will reveal evidence of further conspiratorial acts by the Defendants.

III. ARGUMENT AND AUTHORITY

Larry Stuart is not entitled to qualified immunity because he was not performing discretionary functions as a prosecutor when he made the decision to conspire with the remaining Defendants to prosecute Erikson for first degree murder and the related second and near third trials. As a result, his decisions caused Erikson to be tried repeatedly for a crime he did not commit, which violated his right to due process.

Erikson was entitled to due process of the law, as guaranteed by the Fourteenth Amendment of the Constitution. As correctly set forth in Stuart's Motion to Dismiss, the Plaintiff carries the burden of convincing the Court that the law was clearly established, and Plaintiff must meet that burden by doing more than identifying in the abstract a clearly established right and alleging that

the Defendant has violated it.[1] Erikson has identified much more than "abstract" factual allegations which, if nothing more, support circumstantially that a conspiracy to violate Erikson's constitutional rights existed.

The law, which Larry Stuart violated, could not have been more clearly established than Oklahoma statutes.

Tit. 19 O.S. § 215.4 requires

> [a] district attorney is not to act privately, but for the entire people of the state, and it is his duty to be impartial in the discharge of his functions and not to consult any privat4e persons interested in the trial of a criminal case.[2]

Based upon the allegations in Erikson's Complaint, as well as evidence obtained form Pawnee County, Stuart consulted with Turpen and Stonecipher prior to the initiation of any charges against Erikson, which is clearly a violation of Oklahoma statutes. Any reasonable district attorney would have inquired as to the motivation of the third party contact and would have ascertained the biasedness of the contact. Instead, Stuart furthered the biased approach of the contact by soliciting and accepting funds to assist him in Erikson's prosecution and acting in the interests of the third parties.

Stuart was not exercising discretion in the function of his duties. If anything, he was acting as a private attorney for parties interested in the outcome of Erikson's prosecution, namely Turpen, Riggs-Abney and the OSA (of

---

1 *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988).

2 *Kelly v. Ferguson*, 115 P. 284 (Okl. Cr. 1911).

which Fred Head and Tony McCullom, the deceased, were members) vis-a-vis Stonecipher.[3]

In *Spurlock v. Satterfield*,[4] the court held that a deputy sheriff was not entitled to absolute and/or qualified immunity for allegations that he wrongfully investigated, prosecuted, convicted and incarcerated the plaintiff and fabricated evidence, manufactured probable cause and conspired with others to maliciously prosecute and convict him.[5]

Conclusion

Erikson respectfully requests this Court allow him to proceed with his right to pursue the violation of his constitutional rights by the Defendants by allowing him to conduct any and all necessary discovery to support his claims against the Defendants.

Respectfully submitted,

/s/ Brett D. Sanger
Brett D. Sanger, OBA No. 14850
BRETT D. SANGER, P.C.
1500 City Place Building
204 N. Robinson
Oklahoma City, OK 73102
Telephone: 405-232-1015
Facsimile: 405-239-7795
And

---

[3] Note that Stonecipher was President of the OSA as well as the majority stockholder of Prepaid Legal, one of, if not, the largest clients of Turpen and/or Riggs-Abney.

[4] *Spurlock v. Satterfield*, 167 F.3d 995 (6th Cir. 1999).

[5] *See also Houston v. Partee*, 978 F.2d 362 (7th Cir. 1992).

William H. Bock, OBA #13888
Michelle Rodgers, OBA #17507
WILLIAM H. BOCK, INC.
6402 N. Santa Fe, Suite A
Oklahoma City, OK 73116
Telephone: (405) 848-5400
Facsimile: (405) 848-5479
ATTORNEYS FOR PLAINTIFF,
MICHAEL ED ERIKSON

CERTIFICATE OF SERVICE

This will certify that on the 8th day of April, 2000, a true and correct copy of the above and foregoing was placed in the U.S. Mail, with sufficient postage affixed thereon, addressed to:

James L. Gibbs, Rachel Jackson
and Chris J. Collins
Collins, Zorn, Jones & Wagner, P.C.
429 NE 50th, Second Floor
Oklahoma City, OK 73105-1815

Douglas A. Wilson, James R. Polan
Riggs, Abney, Neal, Turpen, et al.
502 W. Sixth Street
Tulsa, OK 74119-1010

Ken Rainbolt
Ken Rainbolt, P.C.
P.O. Box 207
Durant, OK 74701-0207

Wellon B. Poe
Assistant Attorney General
4545 N. Lincoln, suite 260
Olahoma City, OK 73105

Billy A. Mickle
P.O. Box 1365
Durant, OK 74702

S.M. Fallis, Jr., Thomas D. Robertson
Trent A. Gudgel
Nichols, Wolfe, Stamper, Nalley, et al.
Suite 400 Old City Hall Building
124 E. Fourth Street
Tulsa, OK 74103-5010

/s/ Brett D. Sanger
Brett D. Sanger

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

(1) MICHAEL ED ERIKSON, Plaintiff, -vs- (1) PAWNEE COUNTY, an Oklahoma political subdivision, ex rel. BOARD OF COUNTY COMMISSIONERS OF PAWNEE COUNTY, et al. Defendants.	))))))))))))	Case No. 99-CV-0786-BU(M)

PLAINTIFF'S OBJECTION TO THE REPORT AND RECOMMENDATION OF THE MAGISTRATE

(Filed July 5, 2000)

COMES NOW THE PLAINTIFF, Michael Ed Erikson ("Erikson"), and hereby objects to the Report and Recommendation (hereinafter the "Report") filed herein by United States Magistrate Judge Frank H. McCarthy with respect to granting the Defendants', and each of their, Motions to Dismiss and denying Plaintiff's Motion to Join Additional Party Defendant. Erikson's Complaint sets forth factual allegations that, if proven to be true, support causes of action against each and every Defendant in the captioned matter. Erikson's allegations are specific enough to warrant this matter proceed. He is not required to prove the facts alleged but to specify allegations against the Defendants which support a cause of action.

In support of his Objection, Erikson respectfully submits the following:

STANDARD OF REVIEW FOR MOTIONS TO DISMISS

Defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) should not be granted by this Court unless the Court determines the Plaintiff can prove no set of facts in support of his claims that would entitled [sic] him to relief. *Mauz v. Mountain States Tel. & Tel. Inc.*, 54 F.3d 1988 (10th Cir. 1995). If the court accepts Erikson's factual allegations as true, and indulges all inferences in his favor, then Erikson should be allowed to proceed through the discovery process to support his claims because, if said factual allegations are in fact true, Erikson's civil rights, as guaranteed by the United States Constitution have most certainly been violated.

ERIKSON'S FACTUAL ALLEGATIONS

The pertinent factual allegations contained in Erikson's Complaint, if true, support a cause of action for a civil conspiracy as well as continuing violations of his civil rights pursuant to U.S.C. 28 § 1983, et seq., as well as possible Fourth Amendment violations.

The Report does not address whether all the allegations, if proven true, support the causes of action against the Defendants. Erikson submits the allegations support causes of action against the Defendants, and Erikson should be entitled to conduct discovery to further prove his allegations. There is no harm to the Defendants for

this Court to allow Erikson to conduct discovery to further support his causes of action. If the discovery process proves futile, the Defendants should be dismissed upon dispositive motions. All of the factual allegations contained in Erikson's Complaint smack of impropriety among the Defendants and circumstantially support that a conspiracy existed among the Defendants.

On or about April 10, 2000, at this Court's request, Erikson submitted an Aid to the Court for this Court's review. Included in the Aid to the court were factual allegations which, if proven true, would entitle Erikson to relief in the instant matter. The nine (9) allegations are resubmitted herein as follows:

1. In violation of Oklahoma statutes, Stuart solicited (according to media publications) and/or accepted private funds for the prosecution of Erikson.

2. Stuart conspired with, by pre-prosecution contact with, Defendants Harland stonecipher ("Stonecipher"), Michael Turpen ("Turpen"), and Riggs, Abney, Neal, Turpen, Orbison & Lewis, Inc.'s ("Riggs-Abney") to prosecute Erikson for first degree murder.

3. In violation of tit. 19, O.S. § 215.4, Stuart acted privately and consulted private persons interested in the trial of a criminal case by contact with Turpen, Riggs-Abney, the OSA and Stonecipher.

4. Stuart caused the transfer of Erikson from Payne County to Pawnee County because Payne County likely would have refused to prosecute Erikson for first degree murder.

5. Stuart attempted to utilize faulty evidence from the scene of the incident, namely by presenting a fifth bullet fragment from the scene, for purposes of enhancing charges of first degree murder against Erikson, albeit the absence of a fifth shell casing from the rifle used in the incident.

6. Stuart brought repeated charges against Erikson, when a reasonable prosecutor would have known a conviction would never be obtained, solely for the purpose of obtaining a plea bargain by Erikson for the benefit of the remaining conspirators.

7. Erikson believes evidence exists that Pawnee County District Judges Scott and Revard had prior connections, including business connections, with one of the decedents, Fred Head, which may have caused a biased decision in determining probable cause to prosecute Michael Erikson for first degree murder. Plaintiff believes Stuart may have utilized such connections to cause a determination of probable cause to continue Erikson's prosecution.

8. Stuart was aware of a juror who committed perjury in the first Erikson trial which ended in an eleven (11) to one (1) vote for acquittal because of the perjurous juror's failure to deliberate. Stuart failed to pursue perjury charges against the juror, thereby denying Erikson a right to a fair trial.

9. Erikson believes additional discovery will reveal evidence of further conspiratorial acts by the Defendants.

Additionally, Erikson has indicated that evidence at the scene of the incident may have been tampered with

by law enforcement officials and then utilized for purposes of establishing probable cause against him. If Erikson has not made that allegation as clear as he should for consideration by the Court, he will gladly amend his Complaint to assert the allegation more clearly.

Erikson should be entitled to conduct discovery to support any additional causes of action revealed during the discovery process. If false testimony and/or tampered evidence were presented for purposes of establishing probable cause to repeatedly prosecute Erikson, he should be entitled to proceed with this litigation.

The applicable paragraphs of Erikson's Complaint which, if true, support his causes of action are as follows:

Paragraph 27 of the Complaint, alleges that Pawnee County may have lacked jurisdiction to prosecute Erikson at all:

> 27. After three (3) days of confinement in the Payne County Jail, Erikson was transported to Pawnee County. Upon leaving the Payne County Jail, Erikson was advised that charges would likely not be filed. Upon arriving in Pawnee County, however, Erikson was advised that two (2) counts of first degree murder would be filed. Although both affidavits of probable cause indicate the incident took place in Payne County and despite the fact that no charges had been filed, Erikson continued to be held without a bond in the custody of the Pawnee County Sheriff.

Paragraphs 28 through 47, inclusive, circumstantially support that the Defendants collectively engaged in a conspiracy to cause Erikson's prosecution. Irrespective of

whether probable cause was determined at Erikson's preliminary hearing, if in fact Defendants conspired to cause Erikson's prosecution, his civil rights were violated.

PAWNEE COUNTY'S MOTION TO DISMISS

Erikson's allegation that Pawnee County may have had some involvement with private funds used to assist in his prosecution, if true, would include Pawnee in the conspiracy to wrongfully prosecute Erikson. If not for the efforts of third parties and private individuals, Erikson alleges he would have never been prosecuted for murder. It is remarkable that any private citizen could be subjected to the whims of non-governmental parties and placed on trial for his life on repeated occasions.

If Pawnee accepted and utilized the private funds, it too violated Erikson's constitutional rights. Erikson is not required to prove the allegation to survive Pawnee County's Motion to Dismiss.

The "specific" factual allegation against Pawnee County is that it assisted in the utilization of private funds. Pawnee County is not going to voluntarily disclose how it utilized the funds absent formal discovery. Eriksons' allegations against Pawnee County are specific enough to survive a Motion to Dismiss.

LARRY STUART'S MOTION TO DISMISS and PLAINTIFF'S MOTION TO JOIN ADDITIONAL PARTY DEFENDANT

Erikson has briefed, in detail, the reasons Larry Stuart is not absolutely immune from liability as a prosecutor when he is acting outside his prosecutorial role. If Erikson's allegations against Larry Stuart are true, he *has* acted outside his role as a prosecutor and is not entitled to absolute immunity. Larry Stuart, in his individual capacity, should be added as an additional party defendant and declaratory relief should be rendered whether he was acting outside his role as a prosecutor after further discovery is conducted. If evidence at the scene of the incident was tampered with and false testimony presented to the Court, Erikson was denied a right to a fair and impartial trial and he should be allowed to proceed.

MOTIONS TO DISMISS OF HARLAND STONECIPHER, OKLAHOMA SPORTSMAN'S ASSOCIATION, MICHAEL TURPEN AND RIGGS, ABNEY, NEAL, TURPEN ORBISON & LEWIS, INC.

Erikson has identified the referenced Defendants entered into a civil conspiracy to violate his civil rights. Once their conspiratorial conduct was set into motion prior to the time Erikson was charged with a crime, Erikson was denied the right to a fair and impartial trial. Defendants' conduct and illegal contributions prior to Erikson being formally charged cannot be severed by the fact their conspiracy resulted in probable cause being determined to proceed with their goal. The parties were not acting as private attorneys in a criminal trial. They utilized their conspiratorial acts to cause Erikson to be prosecuted, not to assist in a normal prosecution. As a

result of their continuing efforts, Erikson was tried almost three (3) times for crimes for which he had a clear defense. Erikson has alleged facts which support Defendants' conduct violated due process of the law and he should be allowed to continue this matter to further support his claims.

CONCLUSION

THE Defendants' Motions to Dismiss should be denied. Erikson's Complaint specifies factual allegations that, if proven true, support causes of action against the Defendants. The discovery process will prove Erikson's Constitutional rights were violated by the Defendants and he should not, yet again, be denied due process of the law.

WHEREFORE, premises considered, Erikson hereby requests this Court deny the Defendants' Motions to Dismiss and grant Erikson's Motion to Add Additional Party Defendant because he has alleged factual allegations that, if true, indicate his rights have been violated.

Respectfully submitted,

/s/ Brett D. Sanger
Brett D. Sanger, OBA No. 14850
BRETT D. SANGER, P.C.
1500 City Place Building
204 North Robinson
Oklahoma City, OK 73102
Telephone: 405-232-1015
Facsimile: 405-239-7795
And

William H. Bock, OBA #13888
Michelle Rodgers, OBA #17507
WILLIAM H. BOCK, INC.
6402 N. Santa Fe, Suite A
Oklahoma City, OK 73116
Telephone: (405) 848-5400
Facsimile: (405) 848-5479
ATTORNEYS FOR PLAINTIFF,
MICHAEL ED ERIKSON

CERTIFICATE OF SERVICE

This will certify that on the 3rd day of April, 2000, a true and correct copy of the above and foregoing was placed in the U.S. Mail, with sufficient postage affixed thereon, addressed to:

James L. Gibbs, Chris J. Collins
Rachal Jackson, Robert Applegate
Collins, Zorn, Jones & Wagner, P.C.
429 NE 50th, Second Floor
Oklahoma City, OK 73105-1815
(524-2078)

Douglas A. Wilson, James R. Polan
Riggs, Abney, Neal, Turpen, et al.
502 W. Sixth Street
Tulsa, OK 74119-1010
(918-587-2150)

Ken Rainbolt (580-924-1154)
Ken Rainbolt, P.C.
P.O. Box 207
Durant, OK 74701-0207
(580) 924-1151

Wellon B. Poe (528-1867)
Assistant Attorney General
4545 N. Lincoln, suite 260
Olahoma City, OK 73105

Billy A. Mickle (580-924-2600)
P.O. Box 1365
Durant, OK 74702

S.M. Fallis, Jr., Thomas D. Robertson
Trent A. Gudgel
Nichols, Wolfe, Stamper, Nalley, et al.
Suite 400 Old City Hall Building
124 E. Fourth Street
Tulsa, OK 74103-5010
(918-582-9321)

/s/ Brett D. Sanger
Brett D. Sanger